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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-224

HAROLD R. SWENSON, Warden, Missouri State Penitentiary,
Petitioner,

vs.

JAMES WILLIAM STIDHAM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

Comes now the petitioner, Harold R. Swenson, Warden, Missouri State Penitentiary for Men at Jefferson City, Missouri, and seeks Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and would state and allege in the following particulars, to-wit:

OPINIONS BELOW

The Opinions of the Supreme Court of Missouri are cited as *State* v. *Stidham* (Mo. Sup. 1957) 305 S.W.2d 7; *State* v. *Stidham* (Mo. Sup. 1967) 415 S.W.2d 297; and *State* v. *Stidham* (Mo. Sup. 1970) 449 S.W.2d 634, and appear as Appendixes D, E and F. That the opinion of the

United States District Court for the Western District of Missouri is cited as *Stidham* v. *Swenson* (W.D. Mo. 1970) 328 F.Supp. 1291, and appears as Appendix G. That the opinion of the United States Court of Appeals for the Eighth Circuit is cited as *Stidham* v. *Swenson* (8th Cir. 1971) 443 F.2d 1327, and appears as Appendix K. A Motion for Rehearing or Transfer to the Eighth Circuit En Banc was denied by an equally divided court on June 11, 1971 and appears as Appendix L.

JURISDICTIONAL STATEMENT

Respondent filed a Petition for Writ of Habeas Corpus pursuant to Title 28, Section 2254, U.S.C.A., in the United States District Court for the Western District of Missouri, Western Division. That from the denial of the granting of the writ by that court, the respondent appealed to the United States Court of Appeals for the Eighth Circuit, which court without oral argument, or appointment of counsel for Stidham, by its opinion filed on May 24, 1971, remanded the cause to the District Court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker*, 396 U.S. 482 (1970). [See also, *Stidham* v. *Swenson* (W.D. Mo. 1970) 328 F.Supp. 1288]

Jurisdiction is conferred upon this Court by the provisions of Section 1254, Title 28, U.S.C.A., in that this petition was sought within ninety (90) days from the filing of the opinion below and is, therefore, timely under the provisions of Section 2101, Title 28, U.S.C.A.

QUESTIONS PRESENTED

Did the Eighth Circuit Court, hearing a case in habeas corpus, correctly interpret Missouri procedure when it held that the Missouri procedure as to the introduction of confessions in evidence before a jury in a 1955 trial did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court of Appeals, hearing a case in habeas corpus, correctly apply *Simms* v. *Georgia*, 385 U.S. 538, by holding that a finding by which a confession was found to be ". . . [N]ot involuntary as a matter of law . . ." did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court of Appeals abuse its discretion by allowing a second appeal, on identical issues, from the denial of a petition for habeas corpus, after the petitioner had once voluntarily dismissed his appeal?

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C.A., Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court . . ."

Title 28, U.S.C.A., Section 2253, provides:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of

process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Title 28, U.S.C.A., Section 2254, provides:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written

indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the state court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual deter-

mination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia, showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

Missouri Supreme Court Rule 27.26, V.A.M.R., provides:

"A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) *Nature of Remedy.* This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) *When Remedy May Be Invoked.*

(1) The provisions of this Rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) *Form and Sufficiency of Motion.* A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) *Successive Motions.* The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) *Hearing.* As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing shall be held. 'Prompt' means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) *Burden of Proof.* The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) *Presence of Prisoner.* The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) *Right to Counsel.* If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not al-

ready included. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(i) *Judgment.* The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j) *Appeal.* An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the State. An appeal may be taken from the order entered on the Motion as in a civil case as authorized by § 512.020, RSMo 1959, V.A.M.S. Appellate review shall be limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous.

(k) *Costs.* If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal *in forma pauperis* and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) *Counsel on Appeal.* If a prisoner desires to appeal and contends he is without means to employ counsel to perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel, may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

STATEMENT

Respondent is presently confined at the Missouri State Penitentiary at Jefferson City, Missouri, serving a life sentence for First Degree Murder. The procedural history of this case is as follows: On November 23, 1954, an indictment was returned by the Grand Jury and filed in the Circuit Court of Cole County, Missouri, charging defendant and six other penitentiary inmates with the First Degree murder of Walter Lee Donnell, another inmate at that institution, on or about September 22, 1954, during a riot at the Missouri State Penitentiary (App. A, Tr. 5, Cause No. 45537). On that same date, all of those accused including defendant were arraigned before the Court and counsel was appointed to represent each of them individually. On December 6, 1954, all of the accused entered pleas of not guilty (App. A, Tr. 5, Cause No. 45537).

On December 14, 1954, defendant filed a Motion for Production and Inspection, a Motion to Dismiss, a Motion for a Severance, a Motion for a Polygraph Examination and a Motion to Suppress (App. A, Tr. 5, Cause No. 45537). On December 20, 1954, the Court sustained the Motion for a Severance (App. A, Tr. 18, Cause No. 45537), and denied the Motion to Dismiss (App. A, Tr. 19, Cause No. 45537) and the Motion to Suppress (App. A, Tr. 20, Cause No.

45537). On December 23, 1954, the Court denied the Motion for a Polygraph Examination and on January 3, 1955, the State confessed the Motion for Production and Inspection (App. A, Tr. 22, 24, Cause No. 45537). On February 15, 1955, defendant filed an application for change of venue and an affidavit in support thereof based upon the alleged bias and prejudice of Cole County citizens against him, and also filed an affidavit for disqualification of Judge Sam C. Blair based on alleged interest and prejudice (App. A, Tr. 27-44, Cause No. 45537). On February 16, 1955, Judge Blair sustained the application for his disqualification and so notified the Supreme Court of Missouri (App. A, Tr. 45, Cause No. 45537). On February 22, 1955, on order of the Supreme Court of Missouri, Judge George P. Adams was transferred to hear appellant's case and on February 25, 1955, Judge Adams sustained defendant's application for change of venue and transferred this cause to the Circuit Court of Butler County, Missouri (App. A, Tr. 45-49, Cause No. 45537).

On April 25, 1955, defendant waived formal arraignment, pleaded not guilty and the cause proceeded to trial before a jury. Upon learning that the jury had read a newspaper account of the trial, the Court granted defendant's request for a mistrial and the cause was reset for July 18, 1955 (App. A, Tr. 55-64, Cause No. 45537). On July 18, 1955, the trial commenced and continued until July 20, 1955, when the jury returned a verdict finding defendant guilty of murder in the first degree and assessing his punishment at life imprisonment (App. A, Tr. 757-760, Cause No. 45537).

The cause was appealed on the Transcript and the conviction was affirmed by the Supreme Court of Missouri on September 9, 1957, *State* v. *Stidham*, (Mo. Sup.) 305 S.W.2d 7. On March 9, 1958, pursuant to Missouri Supreme Court Rule 27.26, V.A.M.R., the respondent filed *pro se* in

the Circuit Court of Butler County, Missouri, a Motion to Vacate and set aside his sentence. The Motion to Vacate was denied without an evidentiary hearing and on appeal the Supreme Court of Missouri affirmed the order and judgment. *State* v. *Stidham,* (Mo. Sup.) 403 S.W.2d 616.

Thereafter, respondent filed a *pro se* Motion to Vacate and Set Aside his sentence pursuant to Supreme Court Rule 27.26, V.A.M.R., which presented claims allegedly not presented in the first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and on appeal, the Supreme Court of Missouri reversed the order and judgment and remanded the cause for further proceedings in compliance with the amended provisions of Rule 27.26. *State* v. *Stidham,* (Mo. Sup.) 415 S.W.2d 297. Appellant filed a change of venue, and filed his motion in the Circuit Court for the City of St. Louis, and an evidentiary hearing was had December 5, 1968.

At the evidentiary hearing the original transcript and a stipulation of facts were offered and received in evidence and appellant and the State introduced other evidence pertaining to the issues made by the pleadings. On April 14, 1969, appellant's motion to set aside judgment and sentence was overruled (App. B, Tr. 130, Cause No. 54674). A consolidated appeal, both reinstated direct appeal and appeal from respondent's 27.26 hearing, was made to the Supreme Court of Missouri and that Court affirmed the decision of the lower court. *State* v. *Stidham,* (Mo. Sup.) 449 S.W.2d 634.

On February 18, 1970, respondent filed a petition for *habeas corpus* in the United States District Court for the Western District of Missouri, Western Division which was denied by that Court by order entered on May 15, 1970. [*Stidham* v. *Swenson,* 328 F.Supp. 1291]. From this denial

respondent filed a Notice of Appeal and a request for Certificate of Probable Cause which was granted. On June 25, 1970, the United States Court of Appeals for the Eighth Circuit granted respondent's Motion to Dismiss his appeal and on October 14, 1970, denied respondent's Motion to Reinstate his appeal on Eighth Circuit docket. On September 25, 1970, appellant filed a second petition for *habeas corpus* in the United States District Court for the Western District of Missouri in which he stated identical grounds as his prior petition, and additionally attacked lack of counsel at preliminary hearing. The United States District Court for the Western District of Missouri denied his petition for writ of *habeas corpus*, and an appeal was taken to the United States Court of Appeals for the Eighth Circuit. That Court, without oral argument, on the 24th day of May, 1971, reversed and remanded to the District Court for further proceedings provided for in *Sigler* v. *Parker*, 396 U.S. 482 (1970), requiring a further evidentiary hearing before the Missouri courts.

The historical factual evidence presented before the Missouri Circuit Court in 1955 was as follows: Sgt. E. V. Nash of the Missouri Highway Patrol was the State's first witness and set the physical scene by identifying Exhibit 1 as a drawing he made showing the physical makeup of B-Unit of the Missouri State Penitentiary on September 22 and 23, 1954 and in describing that building and the contents thereof (App. A, Tr. 57-64, Cause No. 45537), this witness also identified Exhibits 2, 3, and 7 as photographs showing gates, passageways and cells in and around the maximum punishment area of that institution.

Lt. W. S. Barton of the Missouri State Highway Patrol testified that at 10:00 p.m. on September 22, 1954, he arrived at the Missouri State Penitentiary and went to B-Basement, where he found the severely mutilated body of a man in Cell-18 of the maximum punishment area (App.

A, Tr. 91-92, Cause No. 45537). Lt. Barton identified Exhibit 8 as a photograph of a man whose body he found and it was introduced into evidence (App. A, Tr. 93-94, Cause No. 45537). Lt. Barton further identified Exhibit 9, a sixteen pound sledge hammer, as the instrument he found beside the body on the night in question and further identified Exhibit 10 as a photograph of Cell-18 of the maximum punishment area (App., A, Tr. 9598, Cause No. 45537). This witness testified that when he found the sledge hammer it was bloody, and that all three (3) doors leading into the maximum punishment area of the Missouri State Penitentiary were standing open with water on the floor and debris scattered about (App. A, Tr. 108, Cause No. 45537).

Sgt. James Rhodes, a Laboratory Chemist for the Missouri State Highway Patrol, testified that he analzyed stains on Exhibit 9, the sledge hammer, and that they were human blood (App. A, Tr. 128-130, Cause No. 45537).

J. G. Lamar, Superintendent of Records at the Missouri State Penitentiary, testified that he had control and supervision of all records at that institution and that by law those records had to contain a photograph of and fingerprints of all inmates. He identified Exhibit 8 as a photograph of Walter Lee Donnell, an inmate at the Missouri State Penitentiary, and stated that on September 22, 1954, he viewed Donnell's dead body (App. A, Tr. 135-136, Cause No. 45537), and further testified that he viewed that dead body while an autopsy was performed by Dr. Shull (App. A, Tr. 142-144, Cause No. 45537).

James Enyard, an employee of Dulle Funeral Home in Jefferson City, Missouri, testified that on September 24, 1954, he saw the dead body of the person shown in Exhibit 8, the photograph of Donnell, and that he removed the body to the funeral home and embalmed it (App. A, Tr.

152-155, Cause No. 45537). On the back of that body Mr. Enyard noted on the left side and in the rib section four (4) or five (5) wounds and also found five (5) round wounds on the left chest over the heart (App. A, Tr. 155-156, Cause No. 45537). In his opinion the back wounds were made with a knife and front wounds with a round instrument (App. A, Tr. 157, Cause No. 45537).

Dr. G. D. Shull testified that in Nashville, Tennessee, on September 25, 1954, he performed an autopsy on the body of Walter Lee Donnell. This witness described numerous fractures, punctures, and wounds, and said that it was his medical opinion that the skull fracture was a mortal wound (App. A, Tr. 163-168, Cause No. 45537). This witness testified that two (2) of the five (5) chest stab wounds passed clear through the heart, while two (2) of the back wounds had penetrated the heart. The chest wounds were mortal while the latter in all probability would be so considered (App. A, Tr. 169-170, Cause No. 45537). Dr. Shull further testified that it was his opinion that the back wounds were caused by a thin blade, like that of a pocket knife, but did not penetrate as deep as the front wounds, which were caused by an instrument at least four (4) to five (5) inches long (App. A, Tr. 171-172, Cause No. 45537). This witness testified that there were no gunshot wounds in the body (App. A, Tr. 172, Cause No. 45537). The doctor testified that he thought the blunt end of Exhibit 9, the sledge hammer, could have caused the injury to the skull of Donnell (App. A, Tr. 174, Cause No. 45537).

Clarence Dietzel, a member of the guard force at the Missouri State Penitentiary was on duty at the Missouri State Penitentiary on the night of the riot, and testified that he was on duty in B-Unit and that on that night there were nine (9) inmates in the maximum punishment area, including defendant Stidham (App. A, Tr. 187-188, Cause

No. 45537). A disturbance started in the prison around 6:30 p.m. that night and a group of rioters thereafter tried to break into B-Hall (App. A, Tr. 189, Cause No. 45537). In that group this witness recognized Donald DeLapp, Paul Kenton, Jackie Lee Noble, William Hoover, and Joseph M. Vidauri, and he further heard DeLapp yell to Stidham and tell Stidham that they were coming to get him out and also heard Stidham yell back for them to hurry (App. A, Tr. 190-192, Cause No. 45537). Mr. Dietzel testified that the group outside of B-Unit were using a sledge hammer similar to Exhibit 9 (App. A, Tr. 203, Cause No. 45537), and an iron bar beating on the doors attempting to gain entrance to B-Unit. DeLapp demanded witness Dietzel's keys, which demand was refused (App. A, Tr. 198-199, Cause No. 45537), but eventually the group of inmates broke in Gate No. 2 where the witness was and then they searched him and again demanded the keys to Gate No. 3, which demand was also refused (App. A, Tr. 204-205, Cause No. 45537). The group thereafter got through Gate No. 3 and into Death Row, and Noble and others in the group locked witness Dietzel in a cell in the maximum punishment area for approximately twenty (20) or twenty-five (25) minutes and then took him out of that area and thereafter he did not witness any of the events of the killing (App. A, Tr. 207-210, Cause No. 45537).

The State then called James Creighton, an inmate, and defendant objected to his testimony, the basis being that the witness was claimed to be of unsound mind and defendant requested a hearing to determine his competency which was granted (App. A, Tr. 241, Cause No. 45537). At this inquiry, held outside of the hearing of the jury, Mrs. Alma Miller, a medical records clerk at State Hospital No. 1, in Fulton, Missouri, testified that she was the custodian of the records of the patients in that hospital (App. A, Tr. 242, Cause No. 45537). In conference it developed that

only three (3) pages of the record, marked for identification as Exhibits C, C-1, and D were involved (App. A, Tr. 246-249, Cause No. 45537), and the witness stated that she did not know who prepared those pages, did not see them prepared, did not know when they were prepared, except that an inmate of the Fulton Hospital typed them, and could not say that they were correct (App. A, Tr. 250-252, 256-258, Cause No. 45537). For the purposes of the *voir dire* hearing only the Court admitted Exhibits C, C-1, D, 14 and 15 into evidence and they were incorporated into the Transcript (App. A, Tr. 260-267, Cause No. 45537).

Still outside the hearing of the jury, James Creighton took the witness stand and testified in detail concerning his status as an inmate of the Missouri State Penitentiary, his convictions and the legal proceedings thereon, and his being in a cell in the maximum punishment area on the night in question (App. A, Tr. 267-270, Cause No. 45537). He admitted being in Fulton State Hospital No. 1, Fulton, Missouri, for thirty-five (35) days, admitted a cutting while in the Penitentiary, admitted that he had feigned an attempted suicide to get out of solitary at the prison and transferred to Fulton, but denied being in any other mental institution, denied being taken before a Probate Court and being committed as an insane person (App. A, Tr. 270-273, Cause No. 45537). At the close of this hearing, defendant's request to have witness Creighton declared incompetent was refused.

Before the jury, witness Creighton testified that he was serving a life sentence in the Missouri State Penitentiary and on the night of September 22, 1954, was in Cell 17 in the maximum punishment area, next to Walter Lee Donnell in Cell 18 (App. A, Tr. 278-279, Cause No. 45537). Creighton testified that in June, 1954, Stidham began celling in the maximum punishment area and from then un-

til the night of the riot Stidham cursed, ridiculed and threatened Donnell over and over and told Donnell that he would kill him if he could get at him (App. A, Tr. 280-285, Cause No. 45537). On the night of the riot DeLapp and defendant Stidham hollered back and forth to each other, DeLapp saying that he was going to get Stidham out of his cell and Stidham begging DeLapp to hurry, during which time Stidham was continuing to threaten to kill the witness and Donnell (App. A, Tr. 288-290, Cause No. 45537). Stidham told Donnell that Donnell was to be killed because he had testified against "Thompson and them in St. Louis before the grand jury" (App. A, Tr. 291, Cause No. 45537). Later Stidham got out of his cell and together with Hoover, DeLapp, Kenton, Noble, Laster and Vidauri tried to get into the witness's cell, after clearing the other inmates out of the maximum punishment area (App. A, Tr. 292-293). This group had a key for the lock to witness's cell and were using a pole and a sledge hammer like Exhibit 9 to keep witness back from the front door of the cell. During all of this the witness received a broken jaw but by jamming the lock to the cell with concrete, a comb and "junk" he kept them from getting in (App. A, Tr. 294-296, Cause No. 45537). He heard Stidham tell Donnell they would get him next (App. A, Tr. 297, Cause No. 45537) and then the group moved to Donnell's cell where the sledge was again used (App. A, Tr. 295, Cause No. 45537).

From his cell witness could not see a person enter Donnell's cell but he could see a man go right up to the cell, all seven (7) of the men, including Stidham, headed for Donnell's cell and went out of witness's sight, whereupon witness heard Donnell begging, hollering and pleading for his life, witness then heard a gurgling sound and saw the seven (7) men run out of the cell but thereafter

he did not see any of them during that night (App. A, Tr. 297-299, Cause No. 45537).

Herman Trout, an inmate of the Missouri State Penitentiary and a plumber of that institution, testified that on the night in question he went into his shop in B-Unit after the riot started (App. A, Tr. 335-337, Cause No. 45537) and hid his tools from the rioters and watched while DeLapp, Hoover and Kenton tried to force open a door and heard DeLapp talk with defendant Stidham about getting Stidham out of his cell (App. A, Tr. 338-340, Cause No. 45537). At DeLapp's direction a fire was started and later Vidauri and Noble joined them and knives were produced (App. A, Tr. 341-342, Cause No. 45537). Witness Trout testified that the group eventually got the three (3) doors leading into the maximum punishment area open and Stidham and Laster were let out of the cells, whereupon witness saw DeLapp put his arm around Stidham and say "Gentlemen, I have brought you this far, this is your leader from here on." (App. A, Tr. 344-346). Stidham and others then got weapons, took Guard Dietzel out of that area and after getting other inmates cleared out, went down into the cage of cells in the maximum punishment area proper (App. A, Tr. 347-351, Cause No. 45537). Witness Trout heard hollering and yelling, and after the hollering stopped Stidham and the others emerged from death row and washed their hands in a wash basin and discarded some of their clothing (App. A, Tr. 352, Cause No. 45537). From his position witness could see the actions of the seven (7) men until they got into the maximum punishment area proper, and during the time the seven (7) were in there he heard a man screaming and yelling in a shrill voice stating that he was not a snitch (App. A, Tr. 353-354, Cause No. 45537). While the seven (7) were getting into the maximum punishment area and while they were there, including the time that they washed and left

the area, witness was in the dark in a position where the group could not see him (App. A, Tr. 384, 388, Cause No. 45537). Witness testified that he did not see who murdered Walter Lee Donnell (App. A, Tr. 389, Cause No. 45537).

Sgt. Percy Little, a State Highway Patrolman, testified that on September 27, 1954, he and another Patrolman and four (4) City of St. Louis policemen questioned Stidham in the Athletic Building of the State Penitentiary, and Stidham wrote out a statement, identified as Exhibits 16 and 16-1, and then signed it (App. A, Tr. 394-396, Cause No. 45537). At this stage the Court granted Stidham's counsel's request for a preliminary hearing inquiring into the voluntariness of the oral and written statements made by defendant (App. A, Tr. 398, Cause No. 45537).

At this voluntariness hearing, which covers pages 400-485 of the Transcript, Appendix A, Cause No. 45537, the State presented the testimony of all the police officers and patrolmen who were present at the time of the questioning of Stidham and who heard his oral confession and saw him sign Exhibit 16 and Exhibit 16-1. Each testified that no physical force or threats were used against Stidham and that Stidham voluntarily and of his own free will signed the confession admitting that he and others went into Donnell's cell and cut and beat Donnell and that he himself had used a kitchen knife six (6) to seven (7) inches in length to slash Donnell's face and neck. Each of the officers identified his signature on Exhibit 16-1 and his initials on Exhibit 16, the latter being the first page of the written statement and the former the second page thereof. None of the officers saw a rope in the questioning room and none saw anyone abuse Stidham in any way.

Stidham himself testified on this voluntariness hearing and said that on being questioned in the Athletic shed on September 27, 1954 he had first denied any knowledge of the death of Donnell (App. A, Tr. 474, Cause No. 45537). At this time Stidham said that he was held on a stool by handcuffs, had a belt attached to the legs, a coat was placed on him and his hands were cuffed behind him (App. A, Tr. 452, Cause No. 45537). When Stidham told his interrogators that he would be willing to submit to a lie detector test, Lt. Eitzman told him that he would be given that test immediately, and he was thereupon raised off the floor by a rope attached to the handcuffs on his wrists. The first chaining up lasted fifteen (15) minutes, according to Stidham's testimony, and he still refused to sign a statement, so he was raised up again and left hanging for thirty-five (35) more minutes, during which time he lost consciousness twice and was beaten. Stidham testified that he suffered an injury to his left arm rendering the hand thereof paralyzed in places (App. A, Tr. 453-455, Cause No. 45537), and defendant further testified that because of the torture and pain he agreed to write out Exhibits 16 and 16-1, which he said were dictated to him by Sgt. Little (App. A, Tr. 455, Cause No. 45537). At the close of this testimony the Court made the following ruling:

> "THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the jury, that the statement is and should be

admissible in evidence, subject to further examination of witnesses which might be conducted, so we may proceed with Sgt. Little, as to his identification before the jury of the statement in question, Exhibits 16 and 16-1.

"MR. HENNELLY: In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that these statements were involuntary, is that right?

"THE COURT: That is right. Mr. Sheriff will you bring the jury back in? (App. A, Tr. 486, Cause No. 45537)."

Six police officers then testified before the jury and each identified Exhibits 16 and 16-1 as Stidham's written statement and testified that it was voluntarily given (App. A, Tr. 486-565, Cause No. 45537). Over Stidham's counsel's objection the exhibits were introduced into evidence and read to the jury (App. A, Tr. 569-571, Cause No. 45537). After reading the confession of Stidham, the State rested its case and the Court denied defendant's motion for judgment of acquittal of Murder in the First Degree and his motion for a reduction of the charge (App. A, Tr. 572-573, Cause No. 45537).

Stidham's first witness was Clyde Bridger, State Registrar of Vital Statistics, who identified Exhibit FF as a photostat of the Official Certificate of Death of Walter Lee Donnell, as amended, and also identified Exhibit G as a photostat of that certificate before its amendment (App. A, Tr. 574-580, Cause No. 45537). Mr. Bridger testified that Exhibit G showed the cause of death as being a bullet wound by gun and that Exhibit FF showed the cause of death as by multiple injuries, stab wounds in heart and lung, brain trauma and crushing injury of skull (App. A, Tr. 581-582, Cause No. 45537), the witness testified that the

amendment was made because of an affidavit furnished by the Cole County Sheriff, the sheriff being the one who signed the original Certificate of Death (App. A, Tr. 582-583, Cause No. 45537).

Stidham then took the stand in his own defense and testified that on the night in question he was in a cell in the maximum punishment area of the Missouri State Penitentiary next to the shower, somewhere West of Creighton's cell, and that at about 6:30 p.m. he heard the riot commence (App. A, Tr. 592-593, Cause No. 45537). Stidham denied threatening Donnell or Creighton at any time but recalled that Creighton had often threatened to kill him and others in the maximum punishment area (App. A, Tr. 593-594, Cause No. 45537). An unknown inmate let him out of his cell and he then went upstairs to B-Hall where he listened to the radio and drank coffee with other inmates (App. A, Tr. 596-597). He denied killing Donnell and denied ever being in the cell of Donnell on the night in question, stating that: "I am a thief, but I am not a murderer" (App. A, Tr. 597, Cause No. 45537). Stidham testified he was questioned repeatedly about the murder by police officers and denied any implication at all times (App. A, Tr. 597-600, Cause No. 45537). Stidham then repeated his version of the giving of his oral and written statement in the Athletic shed at the Missouri State Penitentiary and stated that those statements were given because of the pain he was suffering and his inability to resist the torture applied (App. A, Tr. 600-604, Cause No. 45537). Stidham further denied being with DeLapp, Laster and Hoover at any time on the night in question (App. A, Tr. 621, Cause No. 45537) and further testified that the rope which was used to string him up in the shed was tied through a web partition and then to the ceiling of the shed (App. A, Tr. 624, 626, Cause No. 45537).

Stidham called as his witness M. E. Curtis, the records clerk at the Federal Medical Center at Springfield, Missouri, to testify generally as to his position, and to having been at the Federal Medical Center when Stidham was processed at that institution on the 30th of September, 1954. Mr. Curtis testified that the card which was filled out by Stidham indicated that Stidham gave his age as thirty-four (34) years of age (App. A, Tr. 659, Cause No. 45537), that he had no difficulty taking the fingerprints of the left hand, and that they were taken with ease (App. A, Tr. 659-662, Cause No. 45537), that the record did not indicate any signs of physical abuse, or cuts, other than the fact that the record indicated that there was a ragged cut scar between the middle and little fingers on the palm side of the left hand (App. A, Tr. 659-662, Cause No. 45537). Mr. Curtis indicated the manner in which fingerprints were taken for the purposes of the record at the Federal Medical Center, and again testified that he had no difficulty taking the fingerprints of Mr. Stidham's left hand (App. A, Tr. 662-663, Cause No. 45537).

Stidham called Dr. Thomas A. Hatcock, a Doctor at the U.S. Medical Center at the federal prison at Springfield, Missouri, who testified that on the 30th of September, 1954, he made an examination of defendant Stidham which was limited to subjective complaints (App. A, Tr. 665-666, No. 45537). Dr. Hatcock further testified that petitioner was not put through the usual procedure as one would when becoming an inmate at the Federal Medical Center, but was tested strictly as to his subjective complaints. Dr. Hatcock testified that Stidham complained of an injury to his left hand as a result of being suspended by a rope tied to his hands with his hands at his back. It was Dr. Hatcock's further testimony that Stidham complained of stiffness of the left ring and little fingers and an inability to forcibly flex and extend those fingers. Dr. Hatcock re-

vealed that his tests showed an ability to partially flex and extend those fingers although the function seemed to be weak and the muscles seemed to be weak. The doctor's testimony was that Stidham complained of numbness involved in those fingers, but not of a complete loss of sensation, but a numb feeling involving the little and ring fingers (App. A, Tr. 666-667, No. 45537).

When Stidham's counsel asked the doctor if the doctor had actually found weakness in flexation, the doctor testified that the symptoms were subjective and that they were symptoms that could be present without showing external signs of injury and that the supposed trauma would be based pretty much on a patient's story. On the propounding of a hypothetical question to Dr. Hatcock by Stidham's counsel, the doctor testified that the injury to two fingers of Stidham's left hand could have been caused by Stidham's having been hung from the ceiling as Stidham had previously testified (App. A, Tr. 669-670, No. 45537).

On cross-examination, Dr. Hatcock testified that he saw no bruises on Stidham's left arm, that the information about Stidham's ability to flex his left arm and two fingers of his left hand were from Stidham himself, subjective, and entirely dependent upon subjective findings.

The jury found Stidham guilty of murder in the first degree and his punishment was assessed at confinement in the Missouri State Penitentiary for the rest of his natural life.

At the hearing held pursuant to Missouri Supreme Court Rule 27.26, Stidham testified that when he was convicted of murder he was serving a twenty-five (25) year sentence for robbery and had served two prior Dyer Act sentences (App. C, Tr. 18, Cause No. 54674). Stidham fur-

ther testified that he was in solitary confinement from January, 1953, until immediately before the riot, that he was then moved to death row (App. C, Tr. 19, Cause No. 54674), that he was housed in a five by seven room, with no furniture, an old toilet and basin, with cockroaches and rats (App. C, Tr. 20-21, Cause No. 54674). When moved to death row, Stidham was only given a straw tick to sleep on and while on death row was intermittently beaten by guards (App. C, Tr. 22-24, Cause No. 54674).

Stidham testified that the riot occurred at 6:00 p.m. and that he was released from his cell at approximately 8:00 o'clock by a person he identified as Inmate Ford (App. C, Tr. 24, Cause No. 54674). Stidham's testimony was that on being released from his cell he roamed around B Hall, listened to the radio, drank coffee, and stayed in B Hall drinking coffee and listening to the radio until the riot ended. Additionally, petitioner Stidham denied having anything to do with the killing (App. C, Tr. 25, Cause No. 54-674).

Stidham's testimony was that after the riot he was returned to his original cell in death row (App. C, Tr. 26, Cause No. 54674), that the floor was covered with water, and that officers started immediately questioning him through the bars. Additionally, he testified that he was threatened, that he was called names, and that the questioning occurred approximately twenty-five (25) to twenty-eight (28) times with no physical abuse at that time (App. C, Tr. 27, Cause No. 54674).

Stidham testified that at 3:00 a.m. on September 23, 1954, he was awakened by Lt. Barton and questioned for one and one-half hours (App. C, Tr. 29, Cause No. 54674), and that he was questioned in the athletic shack on the lower yard of the Missouri State Penitentiary on the 27th of September, 1954, by Officers Little, Caldwell, Ren-

derer, Overbeck, Billings, and Eitzman (App. C, Tr. 30, Cause No. 54674). Stidham's testimony was that this questioning took approximately an hour, that all the officers had riot guns and sidearms. At this time Stidham testified that he was placed in a chair, hands cuffed behind his back, a belt placed around his ankles, a heavy coat put on him and asked about the murder (App. C, Tr. 31, Cause No. 54674). When he refused to answer, petitioner testified he was lifted from the floor for about fifteen (15) minutes and was lifted a second time at which time he lost consciouness and his arm was paralyzed. After this treatment, he wrote a statement which was dictated to him by Sgt. Little (App. C, Tr. 32, Cause No. 54674). Stidham testified that he did not have an attorney, but that he tried to bribe guards to call an attorney; that after he wrote the statement he was put in O Hall for three days at which time he had nothing to eat, a bare cell with only slacks to wear (App. C, Tr. 34, Cause No. 54674). Stidham testified that he wanted an attorney because the officers had taken him in front of Creighton who couldn't identify him, and he wanted a lawyer to talk to Creighton before someone got to him. Stidham further testified that on the 29th of September, 1954, his body was a mass of bruises and he had lost twenty-five (25) pounds during the five (5) day period (App. C, Tr. 36, Cause No. 54674).

Stidham further testified that the information by which he was charged with murder was read to a group of co-defendants and him, at which time he attempted to get a lawyer and at that time the judge appointed him an attorney. Stidham testified that from the time of the riot to arraignment, he had not talked to anyone except Father Stevens, the Chaplain of the Missouri State Penitentiary. Stidham further testified that he requested to see Father Clark, a Catholic priest in the city of Jefferson City, Missouri, who requested petitioner's present counsel, Mark M.

Hennelly, to represent Stidham. At the time of arraignment Stidham pled not guilty (App. C, Tr. 37-41, Cause No. 54674).

On cross-examination, Mr. Stidham admitted he had been placed in solitary confinement on the 18th of January, 1953, for attempted escape, and that he had served ten (10) years in jail prior to being in the Missouri State Penitentiary.

Stidham called as an adverse witness Officer Billings of the St. Louis Police Department who testified that he had searched the records of the St. Louis Police Department concerning the prison riot in 1954, and that no records were maintained, and indeed other than expense vouchers no reports had been made. Officer Billings testified that one hundred and two (102) police had been on duty three (3) days, and that twenty-five (25) police had remained on duty for a week at the Missouri State Penitentiary after the riot (App. C, Tr. 47-48, Cause No. 54674).

The state offered William Barton, a Missouri State Highway Patrol Officer at the time of the riot, who testified that he was in charge of investigating the riot, but that he did not recall interrogating Mr. Stidham at the time of the statement. On cross-examination, Mr. Barton testified that he had contacted Inmate Creighton, and Inmate Trout, the two inmate witnesses presented by the state at the original trial. In an attempt to impeach Mr. Barton's testimony, Stidham's counsel read from the original trial transcript where Mr. Barton testified that he had in fact questioned Stidham (App. C, Tr. 56, Cause No. 54674).

The state offered the further testimony of Officer Little, a member of the Highway Patrol in 1954 at the time of the riot. Mr. Little testified that he was involved in the investigation of the murder and arson during the riot (App. C, Tr. 59, Cause No. 54674). Little identified the statement

of Stidham, testifying that he saw Stidham sign the statement but couldn't recall whether he was in the room the entire period of time (App. C, Tr. 60, Cause No. 54674).

Officer Little testified that Stidham was not abused, that he had no complaints of being hungry or tired, that Stidham made no complaint about the lack of food or water, that his physical appearance looked normal to him and that Stidham was not told what to write, that the statement was Stidham's and that Stidham was not threatened (App. C, Tr. 61-62, Cause No. 54674).

Officer Little testified that he did not recall Stidham being handcuffed in the room, but did remember that he was wearing a sidearm at the time of the interrogation. Officer Little testified that the conditions in the penitentiary on the day of the confession were unsettled in that the entire penitentiary was not secure at the time and thus the reason uniformed officers were armed. This witness recalled talking to Creighton and Trout before talking to Stidham (App. C, Tr. 63-64, Cause No. 54674).

When questioned as to whether Stidham had been promised anything in return for a statement, Little answered in the negative, and additionally responded that petitioner had not been struck on the legs with "ballbats, nor hung from the ceiling" (App. C, Tr. 66-67, Cause No. 54674).

On cross-examination, Officer Little testified that he arrived at the penitentiary between 9:30 and 10:00 in the morning, that Stidham's statement was taken in the Athletic Building and that he did not recall talking to Stidham prior to the statement (App. C, Tr. 67-70, Cause No. 54674). The officer testified that he believed he recalled Stidham originally denying guilt, that Stidham was sitting during the interrogation, everything in the statement was written by Stidham, and that he was told the format of the state-

ment but not the facts (App. C, Tr. 70-75, Cause No. 54674). This witness specifically testified that Stidham was not strung up, and specifically testified that Stidham was not told what to write (App. C, Tr. 79-80, Cause No. 54674).

The state offered the further testimony of Tom Jenneman, an officer of the police force of St. Louis, Missouri, who identified Stidham in the courtroom, and identified the statement written by Stidham (App. C, Tr. 81-82, Cause No. 54674). Officer Jenneman testified that he took Stidham to the interrogation from which the statement resulted, that there was a bed in the cell, that he didn't recall water in the cell, that Stidham did not complain about the lack of food nor water to him (App. C, Tr. 83-84, Cause No. 54674). Officer Jenneman testified that no one physically abused Stidham, that no one threatened Stidham, and that no one promised him leniency. The witness testified that he handcuffed Stidham when he was brought down to interrogation, and that the handcuffs were taken off during the interrogation. The witness further testified that Stidham was not hung from the ceiling by the handcuffs, and that Stidham wrote the statement himself (App. C, Tr. 85-86, Cause No. 54674).

On cross-examination, Officer Jenneman testified that Stidham was sitting during the interrogation, that to the best of his recollection the officers all had sidearms, and that Stidham on being brought to the interrogation had been handcuffed behind his back (App. C, Tr. 88-89, Cause No. 54674).

The state offered the further testimony of Elmer Overbeck, an officer of the St. Louis Police Department, who identified the statement given by Stidham, and testified that Stidham wrote it himself. This witness testified that the statement was given after approximately one-half hour of questioning, that Stidham was not physically abused,

was not threatened, was not promised leniency. This witness testified that the statement was written by Stidham, that he didn't believe Stidham was handcuffed during the interrogation, that Stidham was not struck with a "ball-bat", and that Stidham was not hung from the ceiling (App. C, Tr. 93-94, Cause No. 54674).

The state offered the testimony of Charles Billings, an officer of the Police Department of the City of St. Louis, Missouri, who identified the statement given by Stidham, testified that the statement was written by Stidham, and testified that Stidham was questioned in the Athletic shed at the Missouri State Penitentiary (App. C, Tr. 99-101, Cause No. 54674). Officer Billings testified that Stidham's physical condition was normal, that he was not physically abused, that he was not threatened, that he was not promised leniency, and that petitioner wrote the statement himself. On cross-examination, this witness testified that Stidham was questioned in the Athletic shed at the Missouri State Penitentiary, but that the equipment was under lock, and that Stidham had not been hung up and beaten (App. C, Tr. 104-106, Cause No. 54674).

In rebuttal, Stidham offered further testimony that he had been hung up and beaten, and as a result of this beating wrote a statement which was dictated to him (App. C, Tr. 109, Cause No. 54674). Petitioner testified that the statement was incorrect in at least three particulars: (1) the statement put his age at twenty-five (25) when he actually was twenty-eight (28) years old; (2) the statement said he had three convictions under the Dyer Act, when he actually had two (2) convictions under the Dyer Act; and (3) that he was a resident of Kansas City, Missouri, while Stidham testified that he had never been in Kansas City, Missouri.

In his findings of fact and conclusions of law, the state court judge, pursuant to Missouri Supreme Court Rule 27.26, in discussing the voluntariness issue before the trial judge, stated as follows:

> "Movant's contention that the trial court failed to find specifically that the confession was voluntary this Court finds is untenable since the Court found specifically that the confession was not involuntary. Webster's New Collegiate Dictionary, 1961, defines 'involuntary' as 'not voluntary', 'not done, given, etc, willingly by choice, or by act of the will . . .' Under the law of this State the Court followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized. . . ." (App. C, Tr. 124, Cause No. 54674).

SUMMARY OF ARGUMENT

The Eighth Circuit conclusion that Missouri procedure at respondent's trial in 1955 was not geared so that the trial court made an initial determination on voluntariness was premised on inadequate consideration of prior Missouri authority.

Missouri procedure, on the determination of voluntariness of a confession, has consistently provided: (1) a hearing outside presence of jury; (2) the hearing is to test the competency of evidence; (3) the trial court is not compelled on presentation of conflicting evidence to submit confession to jury; (4) state carries the burden of nonpersuasion on issue of voluntariness; (5) voluntariness can, and will, be reviewed on appeal, and thus Missouri procedure is fundamentally fair within the Fourteenth Amendment to the United States Constitution.

Finding by Missouri state trial court in 1955, after hearing outside presence of jury, that confession was "not involuntary as matter of law" was a sufficient finding under *Simms* v. *Georgia*.

Three findings appear of record holding the confession voluntary: (1) original determination in 1955; (2) finding by State post-conviction court; (3) finding of Supreme Court of Missouri on appeal.

Jackson v. *Denno* indicates voluntariness finding need not be made at time of trial, thus, the finding on respondent's petition seeking collateral relief, and on appeal to Missouri Supreme Court, both having been post-*Jackson* are adequate findings of voluntariness.

Procunier v. *Atchley* must be extended to hold that petitioner in habeas corpus is not entitled to a new hearing on the coercion aspect of his confession where the only defect pointed to is the form and not the substance of a state court's ruling on competency of evidence for jury consideration.

Constitutional decisions of this court should not be given retroactive application in habeas corpus cases.

The Eighth Circuit was without jurisdiction to consider respondent's successive habeas corpus application in that it had once refused to reinstate respondent's appeal which he had initially dismissed.

ARGUMENT

I.

The Eighth Circuit, hearing a case in habeas corpus, incorrectly interpreted Missouri law when it held that the procedure used at state trial in Missouri in 1955 for testing the competency of a confession, and its subsequent submission to the jury did not meet the minimal standards of Jackson v. Denno.

The decision of the court below incorrectly applies *Jackson* v. *Denno*, 378 U.S. 368 (1964) to Missouri law and demands reversal.

In *Jackson* v. *Denno* this court held that the New York procedure did not fairly determine the issue of voluntariness. Under the New York rule the trial judge had a preliminary hearing regarding the confession and could exclude a confession only if no circumstances existed which would make the confession involuntary. Where facts were disputed, or where reasonable men could differ over the inferences to be drawn from these facts the court in New York *had to* receive the confession and leave to the jury, after proper instructions, both the initial determination of voluntariness and the ultimate determination of truthfulness.

In *Jackson, supra*, this court reserved for determination the question of whether Missouri procedure was an approved method for determining voluntariness. *Jackson* v. *Denno, supra*, at page 380, pages 396-399. There the court held that it was unclear, from the cases then before the court, whether the procedures of fourteen separate states correctly determined voluntariness. The Eighth Circuit Court of Appeals has now incorrectly determined that the Missouri procedure does not meet the *Jackson, supra*, standard.

In *Stidham* v. *Swenson* (8th Cir. 1971) 443 F.2d 1327, the Eighth Circuit remanded to the United States District Court for the Western District of Missouri a habeas corpus proceeding for further proceedings consistent with *Sigler* v. *Parker,* 396 U.S. 482 (1970). After discussing the district court's opinion, the Eighth Circuit states:

> "We believe that the district court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary. . . Our analysis off the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding that the confession was not 'involuntary as a matter of law,' was not, under the then existing Missouri law, the same as finding that it was voluntary." (443 F.2d 1329, 1330).

This was done irrespective of the fact that the Missouri Supreme Court had, in *State* v. *Washington* (Mo. Sup. 1966) 399 S.W.2d 109, held that the pre-*Jackson* cases in Missouri were *indistinguishable in legal effect* from the Massachusetts rule approved. In that case, the court stated:

> ". . . The Missouri practice does not run afoul of the rules laid down in those cases for the determination of the voluntariness of a confession. In Jackson v. Denno, 378 U.S. 368, footnote 7 at page 377, 84 S.Ct. 1774, at page 1781, 12 L.Ed.2d 908, states that: 'Un-

der the New York rule the judge is not required to exclude the jury while he hears evidence as to voluntariness and perhaps is not allowed to do so.' The New York practice was condemned in Jackson v. Denno. It seems the practice of the State of Washington was quite similar to the New York rule. The Missouri practice is indistinguishable in legal effect from the Massachusetts rule as described and impliedly approved in Jackson v. Denno. See also Commonwealth v. Marshall, 338 Mass. 460, 461-462, 155 N.E.2d 798, 800. The Missouri practice contemplates a preliminary or voir dire examination to determine the competency of a confession before it is presented to the jury. This is a full hearing on the voluntariness of a confession out of the presence of the jury and a finding by the court that the confession was voluntary before it is admitted in evidence. State v. Howard, Mo., 383 S.W.2d 701, 702[1]. Thereafter, the witnesses to the circumstances under which the confession was made testify before the jury. The jury then determines the probative value of the confession under the instructions of the court which direct the jury to disregard it entirely if the jury finds the confession was not voluntarily made. State v. Deyo, Mo., 387 S.W.2d 561, 546, 565 [5, 6]; State v. Howard, Mo., 383 S.W.2d 701, 702 [1]." (*Id.* at 114).

A study of representative Missouri cases makes petitioner more reluctant, than was the Eighth Circuit, to conclude that Missouri procedure was improper under *Jackson, supra.* Because of the nature of the reading of Missouri cases by the Eighth Circuit, petitioner is compelled to extensively deal with Missouri case law. That consideration indicates an unbroken one hundred and forty-two year common thread of procedure.

The Missouri procedure had its inception in *Hector (A Slave)* v. *The State* (Mo. Sup. 1829) 2 Mo. 166 where the court states:

> "Whether a confession is sufficiently free and voluntary to be competent testimony is a matter of law to be decided by the court and not by the jury." (2 Mo. 168).[1]

In *State* v. *Patterson* (Mo. Sup. 1881) 73 Mo. 695, the court stated:

> "It belongs alone, as was decided at an early date in this State, to the judicial province to determine as a preliminary question whether a confession was made with that degree of freedom which ought to occasion its admission into evidence. . . ." (73 Mo. 706).

The court further explained its position in *State* v. *Hopkirk* (Mo. Sup. 1884) 84 Mo. 278, by stating:

> "The preliminary question of the admissibility of confessions, is one which belongs alone to the trial courts, and unless it be made plain that error manifest has been committed in this regard, in deciding the question of fact as to whether those confessions were made in circumstances which forbid their being received in evidence and going to the jury, the admission of such confession cannot be held reversible error by this court. . . ." (84 Mo. 283-284).

At the turn of the century, the Missouri Supreme Court reaffirmed this principle in *State* v. *McKenzie* (Mo. Sup. 1898) 45 S.W. 1117, by stating:

> "The learned circuit court pursued the correct and approved practice, in first hearing the circumstances

1. To like effect see: *State* v. *Jones* (Mo. Sup. 1874) 54 Mo. 478; *State* v. *Brown* (Mo. Sup. 1881) 73 Mo. 631.

attending the confession. It was the duty of the court to determine, as a preliminary question, whether the confession was voluntary, before permitting it to go to the jury. . . Having admitted it as evidence, the court correctly ruled that all the circumstances under which it was made should be considered by the jury, under appropriate instructions. . . ." (45 S.W. 1119).

The court made quite clear in *State* v. *Wooley* (Mo. Sup. 1908) 115 S.W. 417, that the question for the judge was that of competency of evidence, when it stated:

"The record discloses that the court proceeded with great care and caution to make the usual preliminary examination as to the admissibility of the confessions made by the defendant. The jury was ordered to retire from the courtroom in charge of the sheriff, and the preliminary examination as to the competency of the confession was carefully considered. Witnesses were introduced as to the circumstances surrounding the defendant at the time he made the statements; what occurred between the defendant and the officers in charge of him at the time; and after hearing such testimony the court ruled that the confession was competent. . . ." (115 S.W. 437).

That the procedure implicitly contemplates a determination of law that the confession is voluntary was made clear in *State* v. *Wilson* (Mo. Sup. 1909) 122 S.W. 671, where it is held:

"The trial court excluded the jury, and made a preliminary examination upon the question of the inducements held out to this defendant to make the confessions, and upon such examination the court ruled that the confessions were voluntary and admissible. . . ." (122 S.W. 675).

In reliance upon the foregoing cases, the court stated in *State* v. *Tharp* (Mo. Sup. 1933) 64 S.W.2d 249:

> "All the witnesses for the state say the defendant was advised he could have counsel and that whatever he said could be used against him. In these circumstances, certainly the trial court did not err in leaving it to the jury to say whether the written confession then made was voluntary or not. While it is the rule that where a confession has been obtained under circumstances rendering it involuntary and inadmissible, a strong presumption exists that any subsequent confession arose from a continuance of the same prior improper influences, and while the presumption must be overcome before the subsequent confession can be received in evidence . . . yet we think the proof here was amply sufficient to make it a jury issue whether the confession in the prosecuting attorney's office was voluntary and independent of any alleged influence exerted on the boys in Trenton the preceding evening." (64 S.W.2d 255-256).

In a case involving a unique trial tactic, *State* v. *Gibilterra* (Mo. Sup. 1938) 116 S.W.2d 88, the court noted that the ordinary procedure of conducting a preliminary hearing outside the presence of the jury had not been used by defense counsel but that counsel had allowed the state's witnesses to testify without objection as to a confession, and did not object to any statements until the confession was itself offered into evidence. Counsel further refused to produce any testimony to substantiate his objection stating that he would do so in open court before the jury. On such facts, the trial court found the confession competent and admitted it for consideration by the jury. In discussing the particular case under consideration, and discussing the general mixed question of

law and fact involved in the preliminary hearing, the court stated:

"Ordinarily, such inquiries are conducted by the court in the absence of the jury. Some decisions hold the court has the right thereat to *determine* (necessarily by weighing the evidence) whether a confession should be submitted to the jury.[1] Others appear to hold that where the evidence is substantial and conflicting, the question should be referred to the jury.[2] A few of these cases say this is true where the state has made a prima facie showing. . . An extensive annotation on the question will be found in 85 A.L.R. 870, 901, where Missouri is classed as a 'doubtful jurisdiction.'

"The rule in this state to be gathered from the cases cited in the margin and others is that if the defendant objects to the admission of the confession on the ground that it was involuntary, and requests a preliminary hearing out of the presence of the jury, the same should be granted. At that hearing if the evidence is conflicting and substantial the court may determine the mixed question of law and fact by weighing the evidence; and if convinced one way or the other should rule accordingly. The state carries the burden of proof at such preliminary hearings.

"It is not the law that if there be any substantial evidence indicating the confession was voluntary the court *must* refer the question to the jury, however much it may be outweighed by evidence to the contrary. If that were true the court would be doing no more than it always does throughout a trial in ruling

2. It should be noted that the conviction in *State* v. *Gibilterra, supra,* was reversed for the failure of the trial court to instruct on the *voluntariness of the appellant's confession.* 116 S.W.2d at 95.

on the admissibility of evidence; and there would be no need of such preliminary hearings except in the rare instances when such evidence is wholly lacking. On the other hand, when there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession. . . ." (116 S.W.2d 93, emphasis and footnote the court's).

In reversing a conviction for forcible rape the court again had occasion to consider the proper use, and the function of the hearing held outside the presence of the jury to test voluntariness. In *State* v. *Bradford* (Mo. Sup. 1953) 262 S.W.2d 584, the court stated the issue before the court as follows:

"The decisive issues upon this review involve the questions whether or not defendant's verbal admissions of his guilt, his written confession, and testimony of defendant's statements and conduct during a so-called 're-enactment' tour to the neighborhood of Cousins home were voluntary and consequently admissible as evidence against him, or whether they were, as a matter of law, involuntary and inadmissible, or were inadmissible because obtained in manner violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." (262 S.W.2d 586).

In discussing the general theory as to submissibility and after restating that the state has the ultimate burden of non-persuasion before the trial court, the court stated:

"Furthermore it is observed that, after a preliminary hearing without the presence of the jury on the issue, a trial court is not obliged to submit the issue of the 'voluntariness' of a confession to a jury merely

because there is substantial evidence tending to show the confession was voluntary however much the evidence of its voluntary character is outweighed by the evidence to the contrary. On the other hand, when there is substantial conflicting evidence and the evidence is close, it is better to refer the issue to the jury than to exclude the confession upon the preliminary hearing. Then the evidence introduced before the jury upon the issue of voluntariness of the confession may also be considered by the trial court (and by the appellate court upon review) together with the evidence introduced at the preliminary hearing, and the confession excluded if it is found, from all the evidence introduced upon the issue, that the confession was involuntary. . . ." (262 S.W.2d 586).

In affirming the conviction of one of respondent Stidham's co-defendants, the Missouri Supreme Court again had occasion to discuss the question of voluntariness. In *State* v. *Laster* (Mo. Sup. 1956) 293 S.W.2d 300, the facts show that when the state indicated that defendant Laster's confession was to be offered the court conducted a hearing outside the presence of the jury on the confession. The state presented evidence, but the defendant presented no evidence at the preliminary hearing. The court as to the voluntariness issue stated:

"Since the defendant chose not to introduce any evidence at the preliminary hearing, and the state made a prima facie case on the voluntary nature of the confession, the court necessarily ruled it admissible. . . In some instances our courts considered also the evidence adduced before the jury in making a final ruling on the admissibility of a confession. . . We rule the confession admissible, however, on the

broader ground that on all the evidence there was no showing sufficiently strong to convince the court conclusively, or as a matter of law, that the confession was involuntary. The question was one for the jury, and an adequate instruction was given on this subject. . . Under our system of jurisprudence it is generally left to the jury to determine whether a confession was voluntary, unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. . . ." (293 S.W.2d 303-304).[3]

As the Eighth Circuit noted the issue of the voluntariness of respondent Stidham's confession was initially discussed in *State* v. *Stidham* (Mo. Sup. 1957) 305 S.W.2d 7. In that case the court stated:

"There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted into evidence before the state established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination. The testimony was to like effect at each hearing. Two members of the State Highway Patrol and four members of the St. Louis Metropolitan Police Force, present at the time defendant claimed physical violence occurred, testified that no promises had been given, or physical violence, duress, threats or abuse was offered to defendant, categorically denying defendant's testimony. On the conflicting showing the issue of the volun-

3. Compare as to burden of producing evidence: *Lego* v. *Toomey*, ... U.S. ....., 30 L.Ed.2d 618 (1972); and *State* v. *Nolan* (Mo. Sup. 1968) 423 S.W.2d 815.

tariness of the confession was for jury." (305 S.W.2d 10).

In a case, later in time, dealing with this issue of voluntariness, the Supreme Court of Missouri in *State* v. *Bridges* (Mo. Sup. 1961) 349 S.W.2d 214, stated:

> "Prior to the admission of the confessions in evidence, an interlocutory hearing was held out of the presence of the jury. The trial court ruled that the confessions were not, as a matter of law, inadmissible [.] The fact issue was submitted to the jury under an instruction that the confessions should be given such probative value as the jury believed they deserved if the jury found that the confessions were voluntarily given." (349 S.W.2d 217).

From the foregoing cases, petitioner submits that several constants appear:

1. The Missouri procedure contemplates a preliminary, or voir dire hearing outside the presence of the jury.

2. At which hearing, the state has the burden of non persuasion.

3. At the closing of the hearing outside the presence of the jury, the court is presented with two alternatives:

> A. The court *can* find the confession involuntary and withhold it from the jury; or, the court may find the confession *competent evidence* for the jury's consideration and *instruct* as to the jury's duty for finding voluntariness and determining credibility, and weight to be given the testimony.[4]

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4. In Missouri, the court may not take the ultimate voluntariness issue from the jury as this is a fatal comment on the evidence and reversible error. *State* v. *Gibilterra*, 116 S.W.2d at 95. Procedure of non-comment by judge to jury implicitly approved: *Lego* v. *Toomey*, 30 L.Ed.2d at 625.

4. A court may make its determination of involuntariness at three points:

A. After the hearing outside the presence of the jury;

B. After hearing evidence before the jury, and before submission to the jury;

C. By the Supreme Court on appeal.[5]

The question then becomes what does submission of the confession to a jury in Missouri mean. In light of the foregoing cataloging of cases, and the conclusions adduced therefrom, petitioner would submit that the submission of the confession to a jury in Missouri is an implicit statement by the judge that, "I find this *competent evidence*".[6]

To be *competent evidence* in Missouri means that the confession may not be obtained by improper inducements, such as promise of immunity or reward, nor may physical or psychological coercion be inflicted.[7]

Petitioner submits that this Missouri determination for submissibility comports with the fundamental fairness doctrine of the Fourteenth Amendment to the United States Constitution and was not struck down in *Jackson* v. *Denno, supra.*

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5. That this possibility is not a hollow right, see: *State* v. *Bradford,* 262 S.W.2d at 590; compare: *Boulden* v. *Holman,* 394 U.S. 478 (1969).

6. The determination is not unlike that as to the general competency of a witness to testify, i.e., testimony of Creighton (App. A, Tr. 241-275, Cause No. 45537). A similar implicit finding is also made by a judge when he denies a judgment of acquittal thus finding enough evidence to go to the jury.

7. *State* v. *Wooley* (Mo. Sup. 1908) 115 S.W.2d 417; *State* v. *Bradford* (Mo. Sup. 1953) 262 S.W.2d 584; and *State* v. *Glenn* (Mo. Sup. 1968) 429 S.W.2d 225. Compare: *Rogers* v. *Richmond,* 365 U.S. 534 (1961).

Had the Eighth Circuit been correct in its theory, the logical extension of that theory would be that had the judge, after hearing evidence outside the presence of the jury as to voluntariness in Stidham's trial in 1955 said, "I find this confession voluntary as a matter of law", the Eighth Circuit would have been compelled to hold that the trial court had not made a sufficient voluntariness finding pursuant to *Jackson* v. *Denno, supra*. Such reasoning merits reversal.

II.

The Eighth Circuit, hearing a case in habeas corpus, incorrectly applied Simms v. Georgia, 385 U.S. 538, by holding that the finding by the circuit court of Butler County, Missouri, in a state criminal trial in 1955, that a confession was not involuntary as a matter of law did not comply with Jackson v. Denno, 378 U.S. 268.

The Eighth Circuit has incorrectly applied *Simms* v. *Georgia*, 385 U.S. 538 (1967).

In *Jackson* v. *Denno*, this court held that in a criminal case a defendant is deprived of due process if, either in whole or in part, the conviction is based upon an involuntary confession without regard to its truth. Additionally, the court made clear that a further standard was required, and the court couched that standard in the following terms:

> "Equally clear is the defendant's constitutional right at some stage in the proceedings to object to use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." (*Jackson* v. *Denno*, 378 U.S. 376-377).

In *Simms* v. *Georgia,* the court held that the standard as to whether an appellate court could determine whether *Jackson* v. *Denno, supra,* had been complied with was a practical test. That test being, not whether certain talismanic words appeared on the record, but whether the record made by the trial court made clear that it had considered, and ruled upon the defendant's objection that the confession was involuntarily coerced. *Simms* v. *Georgia,* 385 U.S. 544.

The test then is two-pronged:

1. At some point in the proceedings a hearing on voluntariness must be had on defendant's request.

2. The judicial determination that the confession is voluntary must appear on the record.

Such being the test, petitioner would submit that irrespective as to what Missouri law may or may not have been as to voluntariness of confessions at the time of Stidham's trial in 1955, on the historical record presented to this court the Circuit Court of Butler County, Missouri, did make a determination concerning the voluntariness of respondent Stidham's confession and that determination complied with the standards of *Jackson* v. *Denno, supra.*

The record indicates that on the calling of the first state's witness who was to offer testimony as to respondent Stidham's oral statement and written confession, counsel for Stidham requested that a hearing be held outside of the presence of the jury. Such a hearing was had, covering eighty-eight pages of the transcript (App. A, Tr. 398-486, Cause No. 45537). By motion, defense counsel requested:

"MR. HENNELLY: At this point, if Your Honor please, the defendant moves the court to conduct a

preliminary examination and asks the court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement, and we ask that that hearing be conducted outside the hearing of the jury.

"THE COURT: And the defendant proposes to show by cross-examination, or by its own testimony the involuntariness of the statement?

"MR. HENNELLY: Yes.

"THE COURT: The request will be granted. . . ." (App. A, Tr. 398, Cause No. 45537).

At the end of this preliminary *voir dire* hearing, and after hearing nine witnesses, including all the officers involved in the taking of the confession, and the defendant himself, the court ruled, after the close of defendant Stidham's evidence on the issue:

"MR. HENNELLY: That is all. That is the defendant's motion, Your Honor.

"THE COURT: Now, at the conclusion of the hearing held outside of the hearing of the jury, the request by the defendant for a hearing upon the statement which has been identified as—

"MR. RILEY: 16 and 16-1.

"THE COURT: 16 and 16-1, it is the court's opinion that the matters concerning the statements should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to *proceed to challenge the voluntariness of the statement and confession, even before the jury,* but it is the court's opinion that upon the evidence that has been offered

before the court and outside of the hearing of the jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sgt. Little, as to his identification before the jury of the statement in question, Exhibit 16 and 16-1." (App. A, Tr. 485-486, Cause No. 45537; Emphasis added).

Petitioner would submit that the state trial court has quite clearly, and "with unmistakable clarity" determined the voluntariness of the confession on the record pursuant to the standards in *Jackson* v. *Denno, supra.* Were any doubt to exist that the judge has ruled as a question of law that the confession is not involuntary, that doubt would be erased by reference to the transcript where counsel for Stidham immediately following the judge's ruling set out above, asked the court:

"MR. HENNELLY: In other words, the court is overruling my motion, and requests that the court to hold as a matter of law, that these statements were involuntary, is that right?

"THE COURT: That is right. Mr. Sheriff, will you bring the jury back in?" (App. A, Tr. 486, Cause No. 45537).

As to this point, petitioner would submit that the trial judge, in 1955, did not abrogate his function under Missouri law to initially determine voluntariness and can but conclude that the standards in *Jackson* v. *Denno, supra,* and *Simms* v. *Georgia, supra,* have been met.

On the original appeal of this cause to the Supreme Court of Missouri that court held:

"There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the state established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination." (*State* v. *Stidham* (Mo. Sup. 1957) 305 S.W.2d 10).

Seven years after respondent Stidham's conviction was confirmed on appeal by the Supreme Court of Missouri he filed a motion to vacate judgment and sentence pursuant to Missouri Supreme Court Rule 27.26, V.A.M.R., in the Circuit Court of Butler County, Missouri. That motion to vacate was denied without an evidentiary hearing, and a second motion filed pursuant to Missouri Supreme Court Rule 27.26, *supra,* was also denied without an evidentiary hearing. On appeal of these denials, to the Supreme Court of Missouri, the court reversed and remanded in *State* v. *Stidham* (Mo. Sup. en banc 1967) 415 S.W.2d 297, for an evidentiary hearing with appointed counsel.

After a full evidentiary hearing (App. C., Cause No. 54674) before the Circuit Court for the City of St. Louis, Missouri, petitioner appealed, and pursuant to *Swenson* v. *Bosler,* 386 U.S. 258 (1967), petitioner was given a reinstated direct appeal and consolidated appeal from denial of his motion to vacate sentence and judgment.

The state hearing court, pursuant to Missouri Supreme Court Rule 27.26, *supra,* after a full evidentiary hearing, at which time respondent Stidham presented no new evidence, ruled on the voluntariness issue as follows:

"Movant's contention that the trial court failed to find specifically that the confession was voluntary this court finds is untenable since the court found specifically that the confession was not involuntary. Webster's New Collegiate Dictionary, 1961, defines 'involuntary' as 'not voluntary', 'not done, given, etc. willingly or by choice, or by act of the will . . .' Under the law of this state, the court followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this court now so finds that the correct procedure was utilized. . . ." (App. C, Tr. 124, Cause No. 54674).

On appeal, the Supreme Court of Missouri in *State* v. *Stidham* (Mo. Sup. 1970) 449 S.W.2d 634, approved the findings of fact and conclusions of law of the judge in the 27.26 hearing, and also made its determination that the confession was voluntary:

"And finally, the court found, as had the previous court, that the oral and written confessions were voluntary and, needless to add, the latter finding is overwhelmingly supported in procedure and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process." (*State* v. *Stidham*, 449 S.W.2d 644).[8]

Three voluntariness findings, then, appear of record:

1. The initial voluntariness finding by the state trial court in 1955;

8. It should be noted that the opinion of the Eighth Circuit in this cause fails to indicate that any consideration was given to the finding by the judge pursuant to Missouri Supreme Court Rule 27.26, or the finding by the Supreme Court on appeal.

2. Two post-*Jackson* v. *Denno* determinations;

   (a) The finding by the Missouri state trial court pursuant to Missouri Supreme Court Rule 27.26;

   (b) The finding by the Missouri Supreme Court on appeal.

The question then becomes at what point in the proceeding must a *Jackson* v. *Denno, supra,* determination be made. In *Jackson, supra,* the court merely announced that a defendant had a constitutional right ". . . (a)t some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. . . ." (378 U.S. 376-377). By reference to the disposition of the case in *Jackson, supra,* it can be seen that this court determined that the proper procedure on remand would be a proper determination by the state court, which did not necessarily include a new trial:

> "It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. Jackson's position before the District Court, and here, is that the issue of his confession should not have been decided by the convicting jury but should have been determined in the proceeding separate and apart of the body trying guilt or innocence. So far we agree and hold that he is entitled to such a hearing in the state court. But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a

new trial, for Jackson has already been tried by the jury with the confession placed before it and has been found guilty." (*Jackson* v. *Denno*, 378 U.S. 394).

Assuming, arguendo but not conceding, that "not involuntary" does not mean "voluntary", in this case there have been two post-*Jackson, supra,* determinations as to voluntariness; as such the *Jackson* standard has been met, the Eighth Circuit must be reversed.[9]

The court has recently reaffirmed this position as to the correct procedure on remand in *Lego* v. *Toomey*, ... U.S. ....., 30 L.Ed.2d 618 (1972).

In *Lego,* this court impliedly approves certain aspects of the Missouri procedure concerning the amount and quality of the evidence to convince a judge that a confession is voluntary (30 L.Ed. 621 [Footnote 1]). Additionally, Missouri law contemplates that the state carries the burden of proving that any confession it offers was not involuntarily obtained, and more than substantial evidence is required to justify finding the confession voluntary.[10] Such factors convince petitioner that the trial court in the instant case made a substantial finding of record that the confession was voluntary.

It appears, then, that after a consideration of the foregoing principles from *Jackson, supra,* and *Lego, supra,* the Eighth Circuit has done little more than engage in a Lewis Carroll exercise of words meaning what I say they mean, when it holds not involuntary does not mean voluntary.

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9. Indeed, it would appear that even this court may enter a finding on the voluntariness of a confession on review. *Boulden* v. *Holman*, 394 U.S. 478, 480.

10. *State* v. *Gibilterra*, 116 S.W.2d 93. As to the Missouri cases discussing a "prima facie" rule, See *State* v. *Laster*, 293 S.W.2d 303, and cases cited therein.

Consideration should also be given to *Procunier* v. *Atchley*, 400 U.S. 446 (1971). In that case, discussing what criteria entitled a petitioner for habeas corpus to a new hearing on the voluntariness issue, this court stated:

> "But those decisions did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events is true, would require the conclusion that his confession was involuntary."

Petitioner would submit that to be consistent with *Townsend* v. *Sain*, 372 U.S. 293 (1963), and the codification of these habeas corpus criteria in Title 28, U.S.C.A., Section 2254, the court must extend its reasoning in *Procunier* one step further.

As *Townsend* v. *Sain*, *supra*, and Title 28, U.S.C.A., Section 2254, indicate, a federal court may not properly exercise its power in habeas corpus to resolve factual situation absent one of the following findings:

(1) That the merits of the factual dispute have not been resolved in state court;

(2) That the fact finding procedure afforded by the state is not adequate to afford a full and fair hearing;

(3) That material facts have not been developed. No finding of record involving any of the three foregoing tests may be found in the Eighth Circuit's opinion.[11]

11. Petitioner notes that the Eighth Circuit commented "... (t)hat several of Stidham's allegations have not been contradicted in the record." (443 F.2d 1331). Petitioner assumes that it is not the law that rebuttal evidence must be offered to every issue pro and con in a given case before credibility may be determined.

Petitioner must therefore assume that the procedure which the trial court used in the instant case for eliciting the *facts* of coercion, were adequate to afford a full and fair hearing, that the material facts as to coercion were developed, and that the merits of the factual dispute as to coercion was resolved. Such being the case, petitioner would submit that this court should hold that an applicant for federal habeas corpus is not entitled to a new hearing on the coercion aspect of his confession, where he can point to no defect in the manner in which the evidence before the state trial court was gathered, but points only to a defect in the court's ruling on the competency of evidence. Clearly, the converse to the rule announced in *Procunier, supra,* is required.

The theory has been advanced that constitutional decisions of this court should be given retroactive application to all non-final convictions pending at the time of this court's holding, but that those seeking habeas corpus relief should generally be treated according to the law prevailing at the time of their conviction. *Mackey* v. *U. S.*, 401 U.S. 667 (1971) concurring opinion of Mr. Justice Harlan.

If the Eighth Circuit opinion is correct, and petitioner submits that it is not, the issue noted by Mr. Justice Harlan as not having been previously presented to this court (*Mackey* v. *U. S.*, 401 U.S. 686) is here squarely presented.

Simply put, habeas corpus has not traditionally, and should not today, be a forum for the exercise of federal judicial power to apply, collaterally, standards not viable at the time of the original appellate review to this court. Common sense demands finality. It is a concept that the most litigious of prisoner piecemeal adjudicators can un-

derstand. Mr. Justice Harlan is right. *Mackey* v. *U. S.*, *supra*. Mr. Justice Harlan's philosophy should be adopted by this court.[12]

Mr. Justice Harlan's principle of retrospectivity is especially applicable when view is given to the facts in the instant case.

Seventeen years after trial, at which the defendant had a hearing and ruling on the very point before this court, the Eighth Circuit has, on latent reflection, after multiple reviews by the state courts, and successive petitions before the federal district court, said in effect: "In 1971, we think the standard announced in 1964, should have been applicable in 1955." If such states the law in habeas corpus, a new position is required.

Finally, petitioner would note the unusual circumstances by which respondent Stidham's appeal reached the Eighth Circuit after successive filings of petitions for habeas corpus in the United States District Court for the Western District of Missouri. By reference to Appendix G, Appendix H, and Appendix I, it can be seen that on June 25, 1970, the Eighth Circuit granted respondent Stidham's motion to dismiss his appeal. It can further be seen that on September 25th, petitioner filed a successive habeas corpus petition in the United States District Court for the Western District of Missouri, and simultaneous therewith filed a motion to reinstate his appeal in the court of appeals. The Eighth Circuit denied Stidham's motion to reinstate, but the United States District Court

12. Bator, Finality in Criminal Law and Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgements, 38 U. Chi. L. Rev. 142 (1970). Contra: *Adams* v. *Illinois*, U.S. , 40 L.W. 4255, 4258 (1972), dissenting opinion of Mr. Justice Douglas; Schwartz, Retroactivity, Reliability in Due Process: A Reply to Professor Mishkin, 38 U. Chi. L. Rev. 719 (1966).

for the Western District of Missouri entertained respondent's second petition and in reliance upon its prior order denied issuance of the writ, and considered an additional grounds, that of preliminary hearing, in light of *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

Petitioner recognizes that *res judicata* is not a general rule applied in habeas corpus, but petitioner would submit that there are two issues on this set of facts: (1) The Eighth Circuit was without jurisdiction to entertain the second petition, except perhaps as to the *Coleman* v. *Alabama, supra,* claim; (2) the Eighth Circuit abused its discretion in entertaining the successive petition.

As to the Eighth Circuit's jurisdiction, petitioner would submit that the failure to reinstate respondent Stidham's initial appeal acted as a denial of application for certificate of probable cause pursuant to Rule 22(b), F.R.App.P., Stidham had his day in court and thus the court was without jurisdiction to consider a second appeal.

Petitioner concludes that an abuse of the habeas corpus procedure is seen by the successive nature of respondent's applications, and would particularly note the dismissal of this cause originally before the Eighth Circuit, and the subsequent second filing on the exact issues before the District Court. Petitioner would conclude that pursuant to Title 28, Section 2254(b); *Salinger* v. *Loisel,* 265 U.S. 224 (1924); *Smith* v. *Yeager,* 393 U.S. 122 (1968); and *Sanders* v. *U. S.,* 373 U.S. 1 (1963) the Eighth Circuit abused its discretion in allowing the docketing of petitioner's second appeal in this case.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below must be reversed.

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